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81-1195

No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF MICHIGAN, PETITIONER,

vs.

MAURICE HURD, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN (AFTER REMAND FROM THIS COURT)

WILLIAM L. CAHALAN
Prosecuting Attorney
Wayne County
State of Michigan

EDWARD REILLY WILSON
Principal Attorney, Appeals
(313) 224-5792

BY: TIMOTHY A. BAUGHMAN (P-24381)
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
(313) 224-5794

QUESTIONS PRESENTED

DID THE MICHIGAN COURT OF APPEALS ERR IN HOLDING THAT UNDER THE FIFTH AMENDMENT " A DEFENDANT'S CONSTITUTIONAL RIGHT TO REMAIN SILENT IS CONSTANT; THERE IS NO DISTINCTION BETWEEN SILENCE PRIOR TO, AT THE TIME OF, OR FOLLOWING ARREST"? (THIS HOLDING EXPRESSLY BEING BASED ON THE UNITED STATES CONSTITUTION AFTER REMAND FROM THIS COURT FOR CONSIDERATION WHETHER THE HOLDING WAS BASED ON FEDERAL OR STATE CONSTITUTIONAL GROUNDS, OR BOTH).

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF MICHIGAN, PETITIONER,

vs.

MAURICE HURD, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN (AFTER REMAND FROM THIS COURT)

NOW COME the People of the State of Michigan, by WILLIAM L. CAHALAN, Prosecuting Attorney for the County of Wayne, EDWARD REILLY WILSON, Principal Attorney, Appeals, and TIMOTHY A. BAUGHMAN, Assistant Prosecuting Attorney and pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Michigan entered in the above-entitled cause on December 15, 1980, rehearing denied on February 10, 1981, leave to appeal denied by the Michigan Supreme Court on June 8, 1981, (three justices dissenting), certiorari granted by this Court and the cause remanded on October 5, 1981; and the Michigan Court of Appeals order on remand entered November 19, 1981.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 102 Mich app 424, ____ NW2d ____ (1980) and is appended at Appendix A. The order denying rehearing is appended at Appendix B. The order of the Michigan Supreme Court denying leave to appeal is appended as Appendix C. This Court's order remanding is appended as Appendix D. The order of the Michigan Court of Appeals on remand is appended as Appendix E.

STATEMENT OF JURISDICTION

The opinion of the Michigan Court of Appeals was issued December 15, 1980, and rehearing denied February 10, 1981. The Michigan Supreme Court denied leave to appeal on June 8, 1981. This Court remanded on October 5, 1981 (No. 81-211). The Michigan Court of Appeals entered its order on remand on November 19, 1981. The jurisdiction of this Court is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person...shall be compelled in any criminal case to be a witness against himself...

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

On direct examination, Respondent testified that the complainant had telephoned him about three days after March 28, 1978. Defendant told complainant that he had heard that the police were looking for him on a rape charge and that she should keep defendant's name "out of it." On cross-examination, the following dialogue ensued:

> Q: By the way, you didn't go to the police when you heard that they were looking for you?
>
> A: No.
>
> Q: I mean you hadn't been involved in this but you heard that they were looking for you for something you hadn't done but you didn't go to them about it?
>
> A: Well, because I thought it was a rumor running around.

Defense counsel did not object to the prosecutor's questions.

The Michigan Court of Appeals reversed, finding that this questioning violated defendant's Fifth Amendment right:

> A defendant's constitutional right to remain silent is constant; there is no distinction between silence prior to, at the time of, or following arrest.

The Michigan Supreme court denied leave to appeal, three justices dissenting. This Court remanded to the Michigan Court of Appeals, which stated that its ruling was based on the federal constitution.

REASONS FOR GRANTING THE WRIT

The Michigan Court of Appeals reversed, finding a violation of defendant's Fifth Amendment right against compulsory self-incrimination (there is no "right to silence"), stating that "a defendant's constitutional right to remain silent is constant; there is

no distinction between silence prior to, at the time of, or following arrest." This statement is incorrect.

In *Jenkins v Anderson,* 65 L Ed 2d 86 (1980), this Court held that there is a difference between pre-arrest and post-arrest silence. Comment on the former is not a penalty for exercise of the right against compulsory self-incrimination because that right has not been exercised. As cogently stated by Justice Stevens concurring:

> ...the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment.

The present case is legally and factually consistent with *Jenkins,* where defendant was questioned regarding his failure to wait for the police and tell his self-defense story after the killing. Here, defendant was questioned regarding his failure to contact the police after he heard they were looking for him. No principled distinction can be drawn between this situation and that in *Jenkins.*

Any argument that the instant case was decided on state grounds has now been laid to rest. The Michigan Court of Appeals relied on the doctrine announced in *People v Bobo,* 390 Mich 355; 212 NW2d 190 (1970), where the Michigan Supreme Court held that "whether his (defendant's) silence was prior to or at the time of arrest makes little difference — the defendant's Fifth Amendment right to silence is constant." (emphasis added). 390 Mich at 360. The court also overruled an earlier case on adoptive admissions as "wholly at odds with the law defining our rights under the Fifth Amendment..." 390 Mich at 362. On remand from this Court the Michigan Court of Appeals expressly held that its decision was based on "US Const, Am V". Because such holdings are at odds with this Court's holdings in *Jenkins,* plenary review should be granted.

CONCLUSION

It is respectfully submitted that the decision of the Michigan Court of Appeals conflicts with a decision of this Court so that plenary review should be granted, and the Michigan Court of Appeals reversed.

Respectfully submitted,

WILLIAM L. CAHALAN
Prosecuting Attorney

EDWARD REILLY WILSON (P-22400)
Principal Attorney, Appeals

TIMOTHY A. BAUGHMAN (P-24381)
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine Street
Detroit, Michigan 48226
(313) 224-5794

Dated: December 3, 1981

APPENDICES

DECISION OF MICHIGAN COURT OF APPEALS

102 Mich App 424 [Dec 15, 1980]

PEOPLE v HURD

Docket No. 45215. Submitted October 1, 1980, at Detroit.
— Decided December 15, 1980.

Maurice Hurd was convicted of first-degree criminal sexual conduct, Wayne Circuit Court, Horace W. Gilmore, J. He appealed, alleging that the prosecutor's opening statement was not supported by the proofs presented during trial, and that the trial court erred in excusing a juror outside defendant's presence, in permitting direct examination regarding his prior conviction record, in allowing an inference to be drawn from his pre-arrest actions, and in instructing the jury regarding reasonable doubt. *Held:*

1. The admission of references in the prosecutor's opening statement which were not later supported by proofs offered does not require reversal. The opening statement was made in good faith under circumstances in which defendant did not object.

2. The trial court did not err in excusing a juror in defendant's absence. Defendant was not affirmatively barred from being present, his absence being attributable to his own actions. Defendant's attorney did not move to delay discussion relative to the dismissal, nor did he object to the proceedings following defendant's arrival. The decision was reasonable and was a proper exercise of the court's discretionary power.

3. Defendant's counsel raised the issue of prior convictions during direct examination of defendant, not to impeach the defendant but to establish that he had never been convicted of a felony. The prosecutor never referred to the subject before or after it was raised. Any prejudice which the dialogue occasioned was minimal and does not require granting a new trial.

4. The trial court erred in permitting the prosecution to imply that defendant's silence when questioned by police officers amounted to an admission of guilt, thereby violating his right to remain silent.

5. The trial court's instruction to the jury, while not constituting error, comes dangerously close to precluding consideration of the lack, want, or insufficiency of the evidence, and, on remand, the trial court should note that a reasonable doubt may arise under such circumstances.

Reserved and remanded.

1. CRIMINAL LAW — PROSECUTING ATTORNEYS — GOOD FAITH ASSERTIONS — PROOFS — APPEAL.

A reference by a prosecutor in his opening statement that something will be proved which is not later proved is not grounds for reversal on appeal if the statement is made in good faith and under circumstances where the defendant did not object.

2. CRIMINAL LAW — IN-CHAMBERS QUESTIONING OF JURORS — ERROR — APPEAL.

The standard by which to determine whether a trial court, by questioning jurors in chambers in a defendant's absence, committed error requiring reversal on appeal is whether there is any reasonable possibility of prejudice.

3. CRIMINAL LAW — DISMISSAL OF JURORS — JUDICIAL DISCRETION.

A trial judge in a criminal case may excuse a juror as an exercise of his discretionary power.

4. APPEAL — FAILURE TO OBJECT — MAINFEST INJUSTICE.

Alleged errors in the admission of testimony during cross-examination by a prosecutor not objected to during trial are not preserved for appeal absent a finding of manifest injustice.

5. CRIMINAL LAW — TACIT ADMISSION RULE — APPLICABILITY — RULES OF EVIDENCE — CONSTITUTIONAL LAW.

The tacit admission rule which permits the introduction into evidence of adoptive admissions is not applicable to criminal cases because if the rule were applied it would be violative of a defendant's Fifth Amendment right against self-incrimination (MRE 801[d][2][B]).

6. CRIMINAL LAW — RIGHT TO REAMIN SILENT — CONSTITUTIONAL LAW.

A nonutterance is not a statement, and the fact that a witness did not make a statement may be shown only to contradict his assertion that he did.

7. CRIMINAL LAW — RIGHT TO REMAIN SILENT — ARREST.

A defendant's right to remain silent is constant; there is no distinction between silence prior to, at the time of, or following arrest.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, William L. Cahalan, Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Gary Dettloff,* Assistant Prosecuting Attorney, for the people.

Chari Grove, Assistant State Appellate Defender, for defendant on appeal.

Before: J.H. GILLIS, P.J., and BASHARA and CYNAR, JJ.

J.H. GILLIS, P.J. Defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(d)(ii); MSA 28. 788(2)(1)(d)(ii). Sentenced to five to ten years in prison, he appeals as of right.

At trial, the prosecutor's opening statement included a comment that the proofs would show that, after the sexual assault, defendant "told one of the men to go downstairs and to heat up a coat hangar", apparently intending to insert it in complainant's vagina. Although the proofs did establish that, on March 28, 1978, defendant engaged in sexual penetration with the complainant, aided or abetted by two other persons (Spanky and Kiyo) under circumstances in which force or coercion was used, the complaintant testified that Spanky approached her with the hanger, that she pulled defendant in front of her, and that Kiyo told Spanky to put the hanger down.

Defendant asserts error because the proofs did not support the prosecutor's opening statement. We find no error, primarily because the complainant's statement to the police which was read into the record during trial indicated that it was defendant who got the hanger, heated it on the stove, and then gave it to Spanky. The prosecutor's opening statement was made in good faith under circumstances where defendant did not object. Reversal is not required on this ground. *People v Moncure,* 94 Mich App 252, 261; 288 NW2d 675 (1979), *People v Joshua,* 32 Mich App 581, 586; 189 NW2d 105 (1971), *lv den* 386 Mich 758 (1971), *cert den* 409 US 853; 93 S Ct 183; 34 L Ed 2d 96 (1972).

On the second day of trial, defendant was at least 25 minutes late for trial. While awaiting his arrival, the trial judge noted that one juror[1] had advised the judge that morning that his (the juror's) son has been arrested for a larceny offense during the weekend. The attorneys joined the judge and the juror in chambers and questioned the juror about his ability to sit on the jury in light of his son's arrest. When they reentered the courtroom, the judge noted on the record that the juror had stated that he knew how defendant's father must have felt while his son was on trial. The defense attorney did not personally desire to excuse the juror, but he stated that he had no objection to the prosecutor's request in that regard. Accordingly, the juror was excused in defendant's absence.

Defendant now claims that his constitutional right to be present at all critical stages of his prosecution was violated when the juror was excused in defendant's absence.

In *People v Morgan,* 50 Mich App 288; 213 NW2d 276 (1973), the jurors were questioned about their awareness of media publicity while in chambers in defendant's absence. Defendant alleged a right to new trial on this basis, and this Court agreed. The Michigan Supreme Court reversed, however, 400 Mich 527, 536; 255 NW2d 603 (1977), *cert den* 434 US 967; 98 S Ct 511; 54 L Ed 2d 454 (1978) *reh den* 434 US 1041; 98 S Ct 783; 54 L Ed 2d 791 (1978), adopting the following test for analyzing the issue from *Wade v United States,* 142 US App DC 356, 360; 441 F2d 1046, 1050 (1971):

" 'It is possible that defendant's absence made no difference in the result reached. The standard by which to determine whether reversible error occurred [is] * * * whether there is "any reasonable possibility of prejudice" '."

---

[1]Fourteen jurors were originally impaneled.

The record does not reveal any reasonable possibility of prejudice in the instant case. Although defendant's delayed arrival in court may have been entirely reasonable, the fact remains that he was not present during the in-court discussion whether to excuse the juror because he was late, not because he was affirmatively barred from being present. Moreover, his attorney did not move to delay the discussion until defendant arrived or voice any objection to the proceedings on defendant's behalf after defendant did arrive in court. Finally, the decision to excuse the juror was reasonable, and, in any event, the judge could have excused the juror even in defendant's presence as an exercise of his discretionary power. *People v Bell,* 74 Mich App 270, 274; 253 NW2d (1977), MCL 768.18; MSA 28.1041.

On direct examination, defendant was asked whether he had ever been arrested and convicted of a felony. Defendant's answer was that "[he] had a record before but it was dropped, the charged were dropped". Further, he answered in the negative the question whether he had ever been found guilty of any felony.

Defendant's testimony does not require the granting of a new trial. Defense counsel's question was not asked in order to impeach defendant, but to establish that he had never been convicted of a felony. Any prejudice which flowed from this dialogue was minimal and cannot be charged in any event to the presecutor, who never referred to the subject before or after it was raised by defendant. *People v Johnson,* 46 Mich App 212, 219; 207 NW2d 914 (1973), *People v Bearden,* 29 Mich App 416, 418; 185 NW2d 438 (1971) *lv den* 384 Mich 832 (1971).

The most serious question raised on the appeal of this case is whether defendant's constitutional right to remain silent was violated

during trial. On direct examination, defendant testified that the complainant had telephoned him about three days after March 28, 1978. Defendant told complaintant that he heard that the police were looking for him on a rape charge and that she should keep defendant's name "out of it". On cross-examination, the following dialogue ensued:

"*Q:* By the way, you didn't go to the police when you heard that they were looking for you?

"*A:* No.

"*Q:* I mean you hadn't been involved in this but you heard that they were looking for you for something you hadn't done but you didn't go to them to talk to them about it?

"*A:* Well, because I thought it was a rumor running around."

Defense counsel did not object to the prosecutor's questions, so the error, if any, is waived absent a finding of manifest injustice. *People v Stinson*, 88 Mich App 672-674; 278 NW2d 715 (1979).

The error claimed by defendant involves the tacit admission rule which permits the introduction into evidence of adoptive admissions. The rule is not applicable to criminal cases in Michigan. MRE 801(d)(2)(B), *People v Bigge*, 288 Mich 417, 421; 285 NW 5 (1939), *People v Washington*, 100 Mich App 628, 630; — NW2d — (1980). If the rule were applied in criminal cases, it would violate the Fifth Amendment right against self-incrimination. In *Bigge*, defendant was silent in the face of a statement that he was "guilty as hell". In *Washington* defendant remained silent "in the face of an accusatory statement".

In *People v Bobo*, 390 Mich 355; 212 NW2d 190 (1973), defendant was asked by the prosecutor whether he had advised the police that, just before his arrest, two men ran past him.

Although the implication inherent in the question was that defendant did not offer an available "defense" to the arresting officers' suspicions, the function of the question was to show defendant's silence in the face of an accusatory action (arrest). The Court reversed defendant's conviction:

"We will not condone conduct which directly or indirectly restricts the exercise of the constitutional right to remain silent in the face of accusation. 'Nonutterances' are not statements. The fact that a witness did not make a statement may be shown only to contradict his assertion that he did." 390 Mich 355, 359.

See, also, *People v Wade*, 93 Mich App 735, 736-740; 287 NW2d 368 (1979), where defendant hid in her basement until the police returned to her home a second time. Recognizing that "[a] defendant's constitutional right to remain silent is constant; there is no distinction between silence prior to, at the time of, or following arrest", the Court affirmed because the trial court gave a cautionary instruction which "alleviated any possible prejudice to the defendant".

Here, no cautionary instruction was requested or given. Further, the jury was confronted with the testimony of two witnesses, the complainant and the defendant, and asked to balance their credibility in a search for the truth. Although the prosecutor did not refer to defendant's answers to his questions during his closing argument, the implication was clearly given during the testimony that, if defendant was innocent, he would have gone to the police to counter the rumor that they were looking for him on a rape charge. Because the entire case hinged on the credibility of defendant and the complaintant, we cannot say that, in a trial free of the error, one juror might not have voted to acquit. *People v Christensen*, 64 Mich App 23, 32-33; 235 NW2d 50 (1975), *lv den* 397 Mich 839 (1976).

The final question for our consideration is whether error resulted when the trial court instructed the jury as follows:

"In considering the case, *you are not to go beyond the evidence to hunt for doubts nor should you entertain such doubts as are merely fanciful or based on groundless conjecture.* A doubt to justify an acquittal must be a reasonable doubt. A reasonable doubt is a fair doubt growing out of the testomony of the case. It is not a mere imaginary, captious *[sic]* or possible doubt." (Emphasis supplied.)

The emphasized portion of the instruction was not as carefully worded as it might have been. For purposes of remand, we note that "[a] reasonable doubt may arise 'from the lack, want or insufficiency of the evidence for the state', * * *". *People v Davies,* 34 Mich App 19, 26; 190 NW2d 694 (1971), *lv den* 385 Mich 773 (1971). Hence, to say that the jury should not go beyond the evidence comes dangerously close to precluding consideration of the "lack, want or insufficiency of the evidence".

Reversed and remanded for a new trial.

ORDER OF MICHIGAN COURT OF APPEALS
(Entered January 30, 1981)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the thirtieth day of Janaury in the year of our Lord one thousand nine hundred and eighty-one.

Present the Honorable

JOHN H. GILLIS
Presiding Judge

GEORGE N. BASHARA, JR.
WALTER P. CYNAR
Judges

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs.

MAURICE HURD,
Defendant-Appelle.

Docket # 45215
L.C. #
78-826-567-FY

In this cause a motion for leave to file delayed application for rehearing and an application for rehearing are filed by planitiff-appellee, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for leave to file delayed application for rehearing be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the delayed application for rehearing be, and the same is hereby, DENIED for lack of merit in the grounds presented.

STATE OF MICHIGAN — ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered is said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 10th day of February in the year of our Lord one thousand nine hundred and eighty-one.

(s) Ronald L. Dzierbicki
Clerk

ORDER OF MICHIGAN COURT OF APPEALS

(Entered June 8, 1981)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room in the City of Lansing, on the 8th day of June in the year of our Lord one thousand nine hundred and eighty-one.

Present the Honorable

MARY S. COLEMAN
Chief Justice

CR 33-38

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs.

SC: 66721
COA: 45215
LC: 78-826-567 FY

MAURICE HURD,
Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the question presented should be reviewed by this Court.

Coleman, C.J.; Moody and Ryan, JJ., would grant leave to appeal.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 8th day of June in the year of our Lord one thousand nine hundred and eighty-one.

(Seal)

/s/ Corbin R. Davis
Deputy Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 5, 1981

Mr. Edward Reilly Wilson III
12th Floor
1441 St. Antoine Street
Detroit, MI 48226

Re: Michigan,
v. Maurice Hurd
No. 81-211

Dear Mr. Wilson:

The Court today entered the following order in the above entitled case:

The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals of Michigan to consider whether its judgment is based upon federal or state constitutional grounds, or both. See California v. Krivda, 409 U.S. 33 (1972).

Very truly yours,

Alexander L. Stevas, Clerk

ORDER OF MICHIGAN COURT OF APPEALS

(Entered January 30, 1981)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the twelfth day of November in the year of our Lord one thousand nine hundred and eighty-one.

Present the Honorable

JOHN H. GILLIS
Presiding Judge

GEORGE N. BASHARA, JR.
WALTER P. CYNAR
Judges

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Docket # 60397

vs.

MAURICE HURD,
Defendant-Appellant.

ON REMAND

On remand from the United States Supreme Court for consideration of whether our judgment reversing defendant's conviction was based on state or federal constitutional grounds, or both, we hold that the judgment was based on US Const, AM V.

STATE OF MICHIGAN — ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered is said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 19th day of November in the year of our Lord one thousand nine hundred and eighty-one.

(s) Ronald L. Dzierbicki
Clerk

ORIGINAL

81-1195

RECEIVED
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1982

No.. 82-

STATE OF MICHIGAN,

Petitioner,

-vs-

MAURICE HURD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN (AFTER REMAND FROM THIS COURT

RESPONDENT'S BRIEF IN OPPOSITION

STATE APPELLATE DEFENDER OFFICE

JAMES R. NEUHARD (P 18253)
Chief Defender

CHARI GROVE (P 25812)
Assistant Defender
1200 Sixth Avenue
Third Floor - North Tower
Detroit, Michigan 48226
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ORIGINAL

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TERM, 1982

No. 82-

STATE OF MICHIGAN,

Petitioner,

-vs-

MAURICE HURD,

Respondent.
/

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

PROOF OF SERVICE

AFFIDAVIT

STATE APPELLATE DEFENDER OFFICE

JAMES R. NEUHARD (P 18253)
Chief Defender

CHARI GROVE (P 25812)
Assistant Defender
1200 Sixth Avenue
Third Floor - North Tower
Detroit, Michigan 48226
(313) 256-2814

Counsel for Respondent

(1-20-82)

IN THE

SUPREME COURT OF THE UNITED STATES

TERM 1982

STATE OF MICHIGAN,

Petitioner,

-vs-

MAURICE HURD,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Now Comes MAURICE HURD, Respondent, in the above captioned cause, by his attorneys, the State Appellate Defender Office, by Chari Grove and requests this Honorable Court to grant leave to file the attached Brief in Opposition to a Petition for Writ of Certiorari to the Michigan Court of Appeals (without prepayment of costs) and to proceed in forma pauperis pursuant to Rule 46.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____
JAMES R. NEUHARD (P 18253)
Chief Defender

BY: _____
CHARI GROVE (P 25812)
Assistant Defender
1200 Sixth Avenue
Third Floor - North Tower
Detroit, Michigan 48226
(313) 256-2814

Dated: January 20, 1982

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

No.

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

-vs-

MAURICE HURD,

Respondent.

AFFIDAVIT TO ACCOMPANY MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF MICHIGAN)
) SS
COUNTY OF IONIA)

I, MAURICE HURD, being first duly sworn according to law, depose and say in support ofmy motion for leave to proceed in forma pauperis, without being required to prepay costs or fees:

1. I am the Respondent in the above captioned cause; I am a citizen of the United States of America.

2. Because of my poverty I am unable to pay the costs of defending myself in this cause in this Honorable Court; I am unable to give security for the same.

3. I further sear that the responses I have made to the question and instrcutions below relating to my ability to pay the cost of responding to the petition for writ of certiorari are true:

A. I am presently unemployed. I was last employed by

B. I have not been employed since 1972; I have received no income in the past twelve months from any business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends or other sources. I am presently incarcerated at the Ionnia Reformatory, Ionia, Michigan.

C. I do not own any cash or checking or savings account.

D. I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property.

4. I believe that I am entitled to the benefit of the judgment of the United States Supreme Court.

5. I have been found indigent for purposes of: (1) trial in the Wayne County Circuit Court and (2) appeals to the Michigan Court of Appeals and to the Michigan Supreme Court. On all appeals to date I have been represented by the STATE APPELLATE DEFENDER OFFICE, 1200 Sixth Avenue, Third Floor - North Tower, Detroit, Michigan, 48226.

FURTHER, I SAY NOT.

Maurice L. Hurd
MAURICE HURD

Subscribed and sworn to before me
this 21 day of August, 1981.

Notary Public, County of _____
My Commission Expires:
_____

Notary Public, Muskegon Co. Mich.
My Commission Expires Sept. 11, 1984

SUMMARY OF ARGUMENT

Petitioner seeks review of the decision of the Michigan Court of Appeals, alleging that it conflicts with the decision of this Court in Jenkins v Anderson, 65 LEd 2d 86 (1980). The Michigan Court of Appeals found a violation of Defendant's Fifth Amendment right to remain silent, finding no distinction between silence prior to, at the time of, or following arrest. Respondent answers that Jenkins is not controlling in the instant situation for two reasons.

First, this Court in Jenkins did not reach the issue decided by the Michigan Courts in the instant case, i.e., whether prearrest silence may be protected by the Fifth Amendment.

Second, the Court in Jenkins specifically noted that each jurisdiction remains free to decide whether or not to allow impeachment with prearrest silence.* It is, therefore, not the role of this Court to change the established rule in Michigan that the accused may not be questioned about his pre or post arrest silence.

Third, while the Court of Appeals stated in its order of November 19, 1981, that its original decision was based on "US Const, Am V," there still exist independent state grounds for the rule in Michigan that the accused may not be questioned about his pre or post arrest silence.

Fourth, Defendant has applied for leave to appeal the Court of Appeals order to the Michigan Supreme Court. As the final decision on this issue should come from the state's highest court, this court should at least wait until the Supreme Court of Michigan acts on Defendant's application.

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* Also, the questions here were not properly used for "impeachment" because Defendant Hurd never testified to making an exculpatory statement and never denied making an inculpatory statement.

ARGUMENT

Through his questions to Defendant as quoted above, the prosecutor obviously intended to infer that an innocent man would have gone to the police to make an exculpatory statement. This tactic has been repeatedly and consistently condemned by the Courts of the State of Michigan. The Michigan Supreme Court held in People v Bobo, 390 Mich 355, 359 (1973):

> "We will not condone conduct which directly or indirectly restricts the exercise of the constitutional right to remain silent in the face of accusation. "Nonutterances" are not statements. The fact that a witness did not make a statement may be shown only to contradict his assertion that he did."

An examination of Mr. Hurd's testimony shows that he at no time asserted that he responded to Debbie Jordan's accusation by going to the police with a statement. Under Bobo, supra, at 361, the right to remain silent pertains whether the accuser is a police officer or a private citizen. Thus, the prosecutor's questioning of Defendant about his faiure to make a statement at the time of the accusation falls squarely within the prohibition of Bobo. See also People v Bigge, 288 Mich 417 (1939); People v Graham, 386 Mich 452 (1971).

This is not a case, such as People v Eastway, 67 Mich App 464, 468 (1976), in which the improper reference was fleeting and inadvertent. The questioning here was clearly premeditated. The prosecutor three times asked Defendant increduously why, if he knew he was innocent, he did not go to the police or to his accuser and defend himself. The innuendo-filled questions were cleverly designed to embarass Defendant into explaining why he chose silence which constitutionally he cannot be required to explain.

The Court of Michigan have repeatedly found that deliberate violations of the Bobo rule are offensive to the maintenance of a sound judicial system, People v Howe, 80 Mich App 258, 261-262 (1977), and cases cited therein, and therefore, cannot be harmless error. People v Robinson, 386 Mich 551 (1972). Indeed,

in People v Watkins, 401 Mich 830 (1977), the Supreme Court peremptorily reversed, without inquiry into prejudice, because "it is clear from the record that the prosecutor inquired as to the defendant's silence at the time of his arrest."

In People v Wade, 93 Mich App 735 (1979), the Court of Appeals held that the constitutional right to silence is constant and applies equally to pre-arrest and post arrest silence:

> "A prosecutor may not suggest a negative inference from a defendant's pre-arrest failure to either turn himself over or to explain defenses to the police. A defendant's constitutional right to remain silent is constant, thereis no distinction between silence prior to, at the time of, or following arrest."

In People v Sain, 407 Mich 412 (1979), the prosecutor used a police officer's unresponsive testimony concerning the defendant's failure to offer an explanation to the police just prior to his arrest. The Supreme Court reversed on the basis of People v Bobo, supra, even though there was no objection.

Here, the prosecution's case rested solely on the accusation by Debbie Jordan. Her testimony was somewhat suspect in that she waited until a day after the alleged incident to accuse Defendant and then did not help the police to find Mr. Hurd, even though she knew his real name, admittedly knew his telephone number (T. 102), and there is testimony that she had even been to Maurice Hurd's residence (T. 171) and therefore knew where he lived. Ms. Jordan gave the police neither Defendant's full name nor his phone number, and the authorities were unable to locate him until three or four months later (T. 115-128). Defendant admitted being with Ms. Jordan, Spanky and Kiyo on the evening in question, but denied having touched the complainant. He testified that he and Kiyo left Spanky and Debbie in Spank's house. They were having an argument, and Mr. Hurd and Kiyo thought it was none of their business, so they left and did not return (T. 140). In order to discredit Defendant and to attempt to offset the compainant's shaky story, the prosecutor

could not resist the temptation to insinuate that Defendant should have taken it upon himself to go to both the police and his accuser with an explanation and that his failure to do so proves his guilt. In so doing, the prosecutor violated the Bobo rule and Defendant's constitutional rights. It cannot be said, given the very questionable credibility of Ms. Jordan, that the prejudicial questioning of Defendant did not have its intended effect of swaying the verdict of one or more jurors.

The Michigan Court of Appeals reversed the instant conviction on the basis of People v Bobo, supra, and People v Wade, supra further holding:

> "Here, no cautionary instruction was requested or given. Further, the jury was confronted with the testimony of two witnesses, the complainant and the defendant, and asked to balance their credibility in a search for the truth. Although the prosecutor did refer to defendant's answers to his questions during his closing argument, the implication was clearly given during the testimony that, if defendant was innocent, he would have gone to the police to counter the rumor that they were looking for him on a rape charge. Because the entire case hinged on the credibility of defendant and the complainant, we cannot say that, in a trial free of the error, one juror might not have voted to acquit. People v Christensen, 64 Mich App 23, 32-33; 235 NW2d 50 (1975), lv den 397 Mich 839 (1976)."
> People v Hurd, 102 Mich App 424, 431 (1980).

The People of the State of Michigan applied for rehearing in the Michigan Court of Appeals, applied for leave to appeal in the Michigan Supreme Court, and petitioned this Court for a Writ of Certiorari, all on the basis of Jenkins v Anderson, 65 LEd 2d 86 (1980). This Court remanded the case to the Michigan Court of Appeals to state whether its decision was based on state or federal constitutional grounds or both. The Court of Appeals stated that its decision was based on "US Const, Am V". Defendant filed an Application for Leave to Appeal that order in the Michigan Supreme Court, still pending. The People then filed another Petition in this Court, again citing Jenkins.

Defendant Hurd again submits that Jenkins v Anderson, supra, by its own specific language, does not apply to and certainly

does not dictate a change in Michigan's position as expressed in People v Bobo, supra; People v Wade, supra, and the instant case. This Court in Jenkins did "not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment. We simply do not reach that issue ..." 65 LEd 2d, fn 2, at 93. The Michigan Court of Appeals and Supreme Court did reach the issue (in Wade and in the instant case) and found that prearrest silence is protected by the Fifth Amendment. The Court in Jenkins relied on an old case, Raffel v United States, 271 US 494; 40 LEd 1054, 46 S Ct 566 (1926), in which the Court found that the Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with his prior silence (whether prearrest or post arrest). Defendant in the instant case was not "impeached" with prior silence as he never testified that he made an exculpatory statement and never denied making an inculpatory statement. In Michigan, an accused's silence may not be used against him, in the manner in which it was used in the instant case, whether he testifies or not. People v Bobo, supra, relying on People v Bigge, 288 Mich 417 (1939). Also, "there is a serious question about the continuing validity of Raffel", Jenkins, supra at 97, fn. 2 (concurring opinion), and see p. 103-104 (dissenting opinion).

Furthermore, this Court in Jenkins specifically noted that each jurisdiction remains free to decide whether or not to allow impeachment with prearrest silence: "Our decision todays does not force any state court to allow impeachment through the use of pre-arrest silence". 65 LEd 2d at 96. The Michigan Court of Appeals has already declined to follow Jenkins in favor of Bobo in People v James Dixon, 99 Mich App 847 (1980). The Michigan Supreme Court is free to set constitutional standards higher that the minimum standards established by the United States Supreme Court. See, for example, People v Jackson, 391 Mich

323, 338-9 (1974).*

Although the Court of Appeals, on remand, held that its prior decision was based on "US Const, Am V," Defendant submits that there still exist independent state grounds for the reversal of his conviction and that review by this Court is not necessary.

In Hurd, at 430, the Court held that the tacit admission rule "is not applicable to criminal cases in Michigan." The Court of Appeals, per Judge Gillis, went on to hold that the prosecutor's questions violated Defendant's constitutional right to remain silent, relying on People v Bobo, 390 Mich 355 (1973) and People v Wade, 93 Mich App 735 (1979).

This Court in People v Bobo, supra, while citing the federal constitution (and the Michigan Constitution) in a footnote, based its decision principally on Michigan doctrine as stated in People v Bigge, 288 Mich 417 (1939) long before Miranda v Arizona, 16 LEd 2d 694 (1966):

> "In Michigan we have been committed to the doctrine since long before Miranda v Arizona 384 US 436; 86 S Ct 1602; 16 LEd 2d 694; 10 ALR 3d 974 (1966) that even in the face of specific accusation of a crime than an accused's silence may not be used against him. In People v Bigge, 288 Mich 417; 285 NW 5 (1939), this Court said:
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> > 'The time has not yet come when an accused must cock his ear to hear every damaging allegations against him and, if not denied by him, have the statement and his silence accepted as evidence of guilty. There can be no such thing as confession of guilt by silence in or out of court. The unanswered allegation by another of the guilt of a defendant is no confession of guilt on the part of a defendant. Defendant, if he heard

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* Furthermore, Defendant agrees with the dissent in Jenkins that the constitution "prohibits the government from imposing upon citizens any duty to present themselves to the authorites and report their own wrongdoing," that to penalize the defendant "for failing to relinquish his privilege against self-incrimination by permitting the jury to draw an adverse inference from his silence is to place an impermissible burden on his exercise of the privilege," and that the accused may not be forced to choose between the absolute right to testify in his own defense and his absolute right to refuse to incriminate himself prior to trial." 95 LEd 2d at 102-103.

> the statement, was not morally or legally ca ed upon to make denial or suffe his failure to do so to so stand as evidence of his guilt.'"
> 390 Mich at 360-361. (Emphasis added)

The Court in People v Bigge, supra, did not rely on federal constitutional grounds for that "doctrine". It seems quite clear that the above rule and the reversal of Bobo's conviction were based on independent state grounds, and it follows that the judgment of reversal in the instant case was also based on independent state grounds.

The Court of Appeals has already recognized that Michigan has formed its own rules regarding impeachment with pre or post arrest silence, and that, specifically, Michigan courts are not bound by Jenkins v Anderson, supra. In People v Michael William Hoshowski, _____ Mich App _____ (No. 50791, April 28, 1981). A panel of that Court stated:

> "We note that the United States Supreme Court in Jenkins v Anderson, US 100 S Ct 2124; 65 LEd 2d 86 (1980), has recently held that, in general, a defendant who elects to testify in his own behalf waives any Fifth or Fourteenth Amendment objection to the use of his pre-arrest silence for the purpose of impeachment. However, the Court expressly recognized each state is free to form its own evidentiary rules regarding the use of such evidence. 65 LEd 2d at 96. Michigan has already done so. The rule formulated in People v Bobo, 390 Mich 355 (1973) was apparently based on our Supreme Court's interpretation of both the Michigan and Federal Constitutions (Id., at 357 fn 1). A state may adopt a standard which affords its citizens greater protection than is required under the Federal Constitution. Oregon v Hass, 420 US 714, 719; 43 LEd 2d 570; 95 S Ct 1215 (1975), People v Jackson, 391 Mich 323 (1974)."
> People v Hoshowski, fn. 2 (Emphasis added).

See also People v Karam, 106 Mich App 383 (1981) and People v James Dixon, 99 Mich App 847 (1980), where the Court declined to follow Jenkins in favor of Bobo.

Finally, Defendant submits that this Court should at least delay any action on the instant Petition until the Michigan Supreme Court decides Defendant's Application for Leave to Appeal, or, in the alternative, remand this case to the Michigan Supreme Court to determine whether their decision in People v